

1 UNITED STATES DISTRICT COURT
 2 WESTERN DISTRICT OF WASHINGTON
 3 AT TACOMA

4 UNITED STATES OF AMERICA,)	Docket No. CR05-5828FDB
5 Plaintiff,)	Tacoma, Washington
6 vs.)	February 11, 2008
7 BRIANA WATERS,)	VOLUME 1
8 Defendant.)	

10
 11 TRANSCRIPT OF PROCEEDINGS
 12 BEFORE THE HONORABLE FRANKLIN D. BURGESS
 SENIOR UNITED STATES DISTRICT COURT JUDGE, and a jury.

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1 MONDAY, FEBRUARY 11, 2008 - 9:00 A.M.

2 * * *

3 THE CLERK: This is in the matter of the United
4 States of America versus Briana Waters, cause CR05-5828FDB.
5 Counsel, please make an appearance for the record.

6 MR. FRIEDMAN: Good morning, Andrew Friedman and Mark
7 Bartlett for the United States.

8 MR. BLOOM: Good morning, Neil Fox and Robert Bloom
9 for Briana Waters.

10 THE COURT: All right. Let the record reflect that
11 the defendant is present. I understand there's some
12 preliminary matters we need to talk about. I thought we had
13 talked about most of these things at the pretrial conference;
14 I guessed we missed a few.

15 What I am going to do now is hear a few things. I thought
16 I explained, one was about the courtroom being open to the
17 public, and it is. I mentioned that what I would have to do
18 first is impanel this jury. There's quite a few of them
19 coming in, so I need room for them to sit and all of that.

20 And I want those folks to occupy the seats first, and then
21 we will see what seats are left, and then those will probably
22 go in some pool and you can see who's the next one in line to
23 come in and make sure the public aspect of it is done.

24 That's the way it will be done. Once the jury has been
25 empaneled the courtroom will be utilized in the fashion it's

1 normally utilized in.

2 Does that answer your question?

3 MR. FOX: May I make a record, Your Honor?

4 THE COURT: Okay. Your Honor.

5 MR. FOX: Your Honor, with all due respect, we
6 believe the courtroom should be completely open for jury
7 selection. If there are too many jurors and not enough seats
8 for the public, then we need to get a larger courtroom.

9 I would just note for the record, that I don't know the
10 Ninth Circuit law very well on this, but I know the Washington
11 Supreme Court -- just a few years ago in Re: Orange --
12 reversed a conviction in Yakima, a murder case, where this
13 exact problem arose where there weren't enough seats during
14 jury selection for members of the defendant's family, and the
15 judge said we are just going to have all the seats for the
16 jurors; and then after jury selection, the members of the
17 public can have free access. The Washington Supreme Court
18 found --

19 THE COURT: I understand your exception, and you've
20 made it and that's noted.

21 MR. FOX: Okay.

22 THE COURT: But we are going to proceed in the
23 fashion I said.

24 MR. FOX: Thank you.

25 MR. BLOOM: A couple other matters not as specific as

1 that. We just want to make the record clear that we are
2 concerned about the bare bones aspect of what we are going to
3 come to know about the jurors. We've looked over the
4 questionnaires. I know that there are going to be some
5 questions from the Court, and the jurors are going to have the
6 opportunity to give us some information. So I may be
7 premature on that, but we did submit, as the Court knows, a
8 lengthy questionnaire regarding information that we think that
9 we and Ms. Waters and her family should know about the
10 perspective jurors. We don't understand why it should all be
11 moving so quickly and be such a bare bones information.

12 Ms. Waters is facing, if she's convicted --

13 THE COURT: I know all of those issues, but right now
14 you want to know why it's not done in terms of voir dire the
15 way you indicated in your questionnaire?

16 MR. BLOOM: Yes, but I want to make a complete record
17 of that.

18 THE COURT: I don't want you to argue the case. Just
19 tell me what you want to do so we can get through this. We
20 went through this at the pretrial conference. I don't want to
21 have another one here today. I want to start the trial.

22 MR. BLOOM: Now that I am seeing -- for the first
23 time -- the jury questionnaires that the jurors have
24 completed, it is even more troubling to us. And as I was
25 about to say, Ms. Waters is facing a mandatory minimum

1 sentence of 35 years if she's convicted, particularly of Count
2 6. We believe it's important that we know more about the
3 jurors than we are going to learn.

4 THE COURT: All right.

5 MR. BLOOM: That's one thing.

6 Secondly, as a technical matter, we presumably will be,
7 both sides will be submitting questions to the Court that we
8 would ask the Court to pose to some or all of the prospective
9 jurors; and the Court will decide which of those, if any, he
10 is going to ask. All I ask is that those proposed questions
11 by both sides be marked and retained for the Court record.

12 THE COURT: Well, let me explain to you what I did
13 initially at the pretrial conference that the Court would do
14 the voir dire examination. The Court would take your
15 questions that you think should be asked of the jury, both
16 sides, and then the questions the Court thinks should be asked
17 of the jury, and those questions will be asked of the jury.
18 They will get a chance to respond, and you will get a chance
19 to hear those responses. You can make notes of them.

20 The Court Reporter will be taking all of this down, so
21 there will be a record. Then once those questions have been
22 asked, you will ask for follow-up questions, whether any of
23 these jurors should be asked any additional questions. You
24 will be asked to write those down and submit them to the
25 Court. The Court will look those over and see if those are

1 appropriate questions that should be asked.

2 If they are not asked, the record will be made, and they
3 will be on file. Did I answer all your questions?

4 MR. BLOOM: The last sentence was yes.

5 THE COURT: And I think I said this at the pretrial
6 conference, but you didn't take note of that.

7 MR. BLOOM: I don't think we talked about whether or
8 not rejected questions would be kept a part of the record.

9 THE COURT: That's why I asked you if you wanted to,
10 when we had the pretrial conference, if there was anything you
11 were confused about you could order out the transcript from
12 the Court Reporter and those matters would be answered.

13 MR. BLOOM: While we are talking about the pretrial
14 conference, I do want to make note that that pretrial
15 conference was -- for reasons I don't understand -- closed to
16 the public, so that we are very concerned about this being a
17 public proceeding. Indeed, this proceeding right here today,
18 is the very first time we have had any proceeding with this
19 court that's open to the public, the day of the trial.

20 I would like that record to be clear.

21 THE COURT: Well, I don't know of any other
22 proceedings other than the one before me, and that was closed;
23 that was a pretrial conference.

24 MR. BLOOM: There have been no others. We have asked
25 for conferences. We have asked for oral argument.

1 As I say, today is the very first time that the public is
2 admitted to a conference between the Court and the parties,
3 and we have a First Amendment right and we have a Fifth
4 Amendment right and Sixth Amendment right.

5 THE COURT: I understand you have made your argument
6 in the motions, so you don't have to remake them. I want to
7 deal with the issues now so we can get the jury up here so we
8 can start going through the process.

9 Any other matter about how we are going to conduct the
10 matter?

11 MR. BLOOM: Yes, one more. That at time, when the
12 questioning of the jurors is complete, we would like to have
13 some kind of recess at the Court's choice. We just don't want
14 to discuss amongst us, in front of the jury, what jurors we
15 want to seek to keep and which we seek to challenge.

16 We would like to be able to, the three of us, go into one
17 of the conference rooms and have that discussion out of the
18 presence of the jury.

19 MR. BARTLETT: And I have offered to Mr. Bloom and
20 Mr. Fox and Ms. Waters that we have the room right around the
21 corner outside if the Court would allow them, they are more
22 than free to go in there to discuss it.

23 THE COURT: You folks talk so loud you can't sit
24 there and talk like most cases that I hear when you discuss
25 who you want to strike and who you don't want to strike.

1 MR. BLOOM: I don't want to risk any of the jurors
2 hearing or seeing my body language.

3 THE COURT: I am sure they will probably see that
4 anyway.

5 MR. BLOOM: I don't want them to see that. I don't
6 want them to see we might be unhappy with a particular juror
7 who winds up being seated. That's inappropriate, and there's
8 no need for it. All we are asking is we be able to step out
9 of the courtroom and have a discussion.

10 THE COURT: Do you understand how the striking will
11 take place?

12 MR. BLOOM: I think I do.

13 THE COURT: You will be given a sheet and you will
14 strike from the sheet. It will be a simultaneous striking
15 between you and the government. And you will utilize whatever
16 amount, number that you have. So you are thinking you need to
17 have some brainstorming to do that?

18 MR. BLOOM: Sure. I am not talking about an hour. I
19 am talking about five, six, seven minutes.

20 THE COURT: You will be given a chance to do that. I
21 thought you might have better luck looking at the folks there
22 as you go through that, but you don't need that, you want to
23 send somebody back to the door to look at them, I suppose. I
24 don't know how you do it. I normally have them stay in
25 position as you go through the striking process. You prefer

1 not to have that?

2 MR. BLOOM: Partly yes and partly no. We just want a
3 few minutes where we may have a disagreement between us, and
4 we want to be able to air that without them alluding to that
5 we have a disagreement. That's all, just a few minutes. I am
6 talking five, seven minutes.

7 THE COURT: Anything else?

8 MR. BLOOM: I don't think so.

9 THE COURT: Anything from the government? Anything
10 we need to take up?

11 MR. FRIEDMAN: Not before we seat the jury.

12 THE COURT: There were some motions filed here this
13 morning. I haven't had a chance to go through all of them and
14 deal with the testimony, but I mentioned how we wanted to do
15 that. I asked you to do, as you know, when your witnesses are
16 going to be called, you will give the other side -- before
17 that witness is called -- the name of that witness, the gist
18 of that testimony, the exhibits you intend to use with that
19 witness, and you can make these objections and deal with that
20 matter each time a person is called to testify. We will do it
21 in a fashion that we don't interfere with the jury, because
22 you will have it in a timely fashion and we can raise those on
23 the break, over the noon hour, at the end of the day, whatever
24 might be the case.

25 So I see no need to keep raising these arguments about who

1 is going to say what and what they are going to say and to
2 what extent. Some of these I don't even know if they are
3 going to be called.

4 I asked for an updated witness list this morning, and
5 that's what I want to know, who are you going to call, not who
6 you got on the list that potentially might be here and all
7 that. All right.

8 MR. BLOOM: There is an issue. The government
9 filed -- and we received it about 5:30 p.m. on Friday -- a
10 motion, the determination of which may well affect what we
11 will be saying in opening remarks. So that doesn't have to be
12 dealt with now, but it should be dealt with before opening
13 statements.

14 THE COURT: Which one is that in particular, and I
15 will take a look at that.

16 MR. FRIEDMAN: It's titled: Motion in limine to
17 exclude references to complaints against agents and to the use
18 of agents notes or reports. It's docket 293.

19 THE COURT: It would sound like this is something,
20 Mr. Bloom, that you are intending to raise in terms of opening
21 statement?

22 MR. BLOOM: I had not shared with the government what
23 I intended to say in opening remarks, but apparently in
24 anticipation of some concerns they might have, they filed this
25 motion.

1 THE COURT: I understand, but you can answer my
2 question: Do you intend to raise that? If you don't intend
3 to raise that in your opening statement, then I don't need to
4 deal with that right now.

5 MR. BLOOM: Yes, I do intend to raise some of the
6 issues to which they refer.

7 THE COURT: All right, okay.

8 MR. BLOOM: Also, there was some back and forth about
9 the hours of the proceedings and the days of the week.

10 THE COURT: Let's put it this way, as far as this
11 trial, we are going to go through the whole week, through
12 Friday. The hours I will utilize will depend on when I
13 empanel this jury and find out a little bit about them before
14 I make that determination.

15 MR. BLOOM: I do notice that a couple perspective
16 jurors are as far south as Vancouver; that's quite a trip.

17 THE COURT: We always get them from there.

18 MR. BLOOM: I am not saying good or bad, I am just
19 saying it's a lengthy trip.

20 THE COURT: It might be if we start early. I
21 wouldn't think we'd start any earlier than 8:30. Whether we
22 shorten it in some way, what do we do about the noon hour, and
23 we talked about that a little bit. If I recall, both sides
24 were in agreement with making some effort to do that.

25 MR. BLOOM: There was some back and forth and some

1 options.

2 The reason I ask, for the attorneys we can deal with
3 whatever it is. But Ms. Waters and her partner have a
4 three-year old daughter, and it really is logistically very
5 difficult dealing with her, her bedtime, her waking time.
6 Regularity is one thing, and frankly the later the better for
7 Ms. Waters. A half hour makes a big difference.

8 THE COURT: What do you mean, in terms of starting?

9 MR. BLOOM: Yes.

10 THE COURT: Anything else?

11 MR. BLOOM: No.

12 THE COURT: All right. Then are we ready to bring
13 this jury up?

14 Let me mention again about the seating. It's not to keep
15 the public out so you can't sit and hear and see what's going
16 on. I can't get the King Dome or Tacoma Dome for this trial.
17 This is it, what I have right here; this is the size of it.
18 You will be accommodated the best we can, but we are going to
19 ask you to let the jury be seated first.

20 We will go through that process. If there are any seats
21 left over after the jury is in here, you are welcome to those
22 seats. Once the jury is empaneled, all of them will be here,
23 so that whole section will be open.

24 All right. We will be in recess until we get the jury.

25 THE CLERK: All rise, Court is in recess.

1 (Brief recess.)

2 THE CLERK: This is in the matter of the United
3 States of America versus Briana Waters, Cause CR05-5828FDB.
4 Counsel, please make an appearance for the record.

5 MR. FRIEDMAN: Good morning, Your Honor, Andrew
6 Friedman for the United States.

7 MR. BARTLETT: Mark Bartlett for the United States.
8 Also seated at counsel table is FBI Special Agent Ted Halla.

9 MR. BLOOM: Good morning, I am Robert Bloom, one of
10 the attorneys for Briana Waters. This is Neil Fox, her other
11 attorney; and this is Briana Waters.

12 Thank you.

13 THE COURT: All right. The first thing I would like
14 for you to do is stand as prospective jurors, raise your right
15 hand, so the clerk can administer the general oath.

16 (Prospective jury panel duly sworn.)

17 THE COURT: All right. You may be seated.

18 You have been called here to help us out with this case.
19 This is the system. We need folks like yourselves to give of
20 your time and to hear the evidence and decide the case.

21 The length of this trial, to give you the best guess, will
22 be around three weeks. I think that's the outside that they
23 are telling me. I don't know how to gauge it any better than
24 that, but that's the timeframe that will be involved.

25 I ask you to keep that in mind as we go through this. If

1 that becomes problematic in some way, we will discuss it.

2 The trial, to give you the gist of what this is, the
3 allegations filed here is one of conspiracy and crimes that
4 flow from that. It is alleged here that this defendant,
5 Ms. Waters, was involved in this conspiracy; and that
6 conspiracy was to commit arson and other crimes supposedly in
7 an effort to advance the cause of environmental protection and
8 animal rights. You may have heard things like this referred
9 to as eco-terrorism, and we will talk a little bit more about
10 things of that nature. And being a member of that conspiracy,
11 she is also charged with aiding and abetting the possession of
12 an unregistered destructive device. She's also charged with
13 aiding and abetting, on May 21, an arson at the Center for
14 Urban Horticulture at University of Washington in Seattle.
15 She's also charged with aiding and abetting the use of this
16 destructive device in the commission of that arson.

17 You will be called upon to decide this case.

18 (Voi r dire commenced and reported.)

19 THE COURT: All right, this looks like it might be a
20 good spot to take a recess and give you a chance to grab a
21 sandwich. I am going to ask of you now as you go about your
22 noon hour, not to discuss anything, try to find out anything,
23 try to talk to anybody. If anybody should come up to you to
24 talk to you about what's going on here, I hope you'll turn
25 them away.

1 If they don't listen to that, that you inform the Court as
2 to any sort of contact. Wear your buttons so everybody can
3 see you, and they should stay away from you.

4 After you've gotten your lunch, I will have you go back to
5 the jury assembly room and we will get you from there.

6 1:30 will give you about an hour to get a sandwich. Will
7 that work? We will reconvene at 1:30. I ask you now if you
8 would file out and go to lunch, and I will see you back here
9 hopefully at 1:30.

10 (Prospective jury panel not present.)

11 THE COURT: All right. You may be seated. I have
12 received some challenges for cause, and I will look at these
13 matters and deal with this once the jury is back in place. I
14 would also ask for you, beyond that, to maybe consider at this
15 point in time, as you mentioned you wanted time to deal with
16 your peremptories, now is the time to utilize that to come up
17 with your positions on those various things, at least the ones
18 that are left.

19 MR. FOX: May I address the Court? Three brief
20 things. One, we will probably provide you, as well, with some
21 challenges for cause after we meet for two minutes.

22 THE COURT: Get them to me as soon as you can and I
23 will consider them, so when the jury comes back I will be
24 ready to deal with that. Don't wait until they come back to
25 give them to me.

1 MR. FOX: If somebody could answer the door.

2 THE COURT: We have somebody on duty for that.

3 MR. FOX: I wanted to very briefly make a record
4 about something. I wanted to point out we had been informed
5 that there were a lot of people that were not able to come
6 into the courtroom. I understand that the Court had two
7 chairs brought in, and at the beginning of jury selection
8 three spectators were allowed in, but the record should
9 reflect there were a large number of people denied entrance
10 who were told they could not come in. I would just point out
11 that there's about 20, 15 --

12 THE COURT: Did they tell you why they were told they
13 could not come in?

14 MR. FOX: Because there was no room in the courtroom.
15 There's about a 15 foot area in front of the tables where we
16 could have moved the tables up and could have set more chairs
17 up. And for the record, we believe that this violates the
18 First Amendment right of public access.

19 THE COURT: What are you saying, you can't see what?

20 MR. FOX: That the members of the public and media
21 have a First Amendment right to be present during the jury
22 selection. I am making a record.

23 THE COURT: All right.

24 MR. BARTLETT: Since we are making a record, just to
25 clarify, when he says there were a large number of people, I

1 would like to have a number.

2 MR. FOX: We were told by the security people that
3 there were like 25 people that were denied access. So I am
4 making a record.

5 THE COURT: I understand. Like I say, and I told
6 you, and I thought I answered that at the outset, but I guess
7 you make an exception every time you go. Can I say you have a
8 standing objection?

9 MR. FOX: I understand. I want to be able to make
10 the record, okay?

11 THE COURT: All right.

12 MR. FOX: The other thing, with all due respect, I
13 would object at the outset of jury selection to the Court
14 using the term eco-terrorism.

15 THE COURT: Okay.

16 MR. FOX: That term brings a lot of emotions to the
17 surface for the jurors. This is a case not about
18 eco-terrorism.

19 THE COURT: It might, and it might also get the
20 answer from some of those folks back there.

21 MR. FOX: I understand, but I am making an objection,
22 and on that basis I would ask for a mistrial.

23 THE COURT: It's denied.

24 MR. BLOOM: A couple things. We will get to you
25 quick in the next few minutes our challenges for cause. The

1 clerk asked us, and I guess asked the other side for
2 questions. We have not in any way been able to prepare the
3 questions. We had hoped to do that over the lunch break and
4 give you proposed questions. We had to pay attention.

5 THE COURT: I understand, Mr. Bloom, and I listened
6 to that. But also, as these questions are being answered, you
7 have pen and paper there. You can note down what you want to
8 raise about these things.

9 MR. BLOOM: I have done that.

10 THE COURT: Then I need you to get them to me. We
11 can't conference after everything we do here.

12 MR. BLOOM: We each made notes about what we want to
13 talk about, but we have to put them into some bad handwriting
14 questions.

15 THE COURT: I am trying to get you two to work
16 together, and you can do different things, and one keep up
17 with this and one keep up with the other thing.

18 MR. FOX: We will get the questions in the next 10 or
19 15 minutes.

20 MR. BLOOM: No, we can't do that.

21 THE COURT: Thank you. We will be in recess until
22 1:30.

23 THE CLERK: All rise, Court is in recess.

24 (Luncheon recess.)

25 THE COURT: All right. You may be seated.

1 I believe that a follow-up question came from the
2 government. I have not seen any from the defense.

3 If you have any, I would like to have them submitted at
4 this time.

5 MR. BLOOM: We do not have them ready. As I
6 indicated to the clerk, we need about 25 or 30 minutes; that's
7 all we need.

8 THE COURT: You had the lunch hour. What have you
9 been doing?

10 MR. BLOOM: I took about eight minutes to have lunch,
11 and then we first discussed our challenges for cause, and now
12 we are discussing what jurors we want and don't want. And
13 based upon that determination, we will be able to tell you
14 what questions we have.

15 THE COURT: I want the follow-up questions.

16 MR. BLOOM: We want to do it all. Ms. Waters is
17 facing the rest of her life in prison. And all we are asking
18 for is a half hour to get it together, so that we can have a
19 fair jury to decide the issues that have to be decided. We
20 are asking for some consideration. I don't quite understand
21 why we can't get it.

22 THE COURT: Let me ask you a question, Mr. Bloom: 30
23 minutes, you can have me every question you want me to ask as
24 a follow-up to these jurors?

25 MR. BLOOM: Yes.

1 THE COURT: You will have them directed as to a
2 particular juror?

3 MR. BLOOM: Those that are particular, yes. Those
4 that are general, yes, too. We will have everything to the
5 Court in a half hour.

6 MR. BARTLETT: I have no objection.

7 THE COURT: At 2:00, give me the questions.

8 THE CLERK: All rise, Court is in recess.

9 (Recess taken.)

10 THE COURT: All right. You may be seated.

11 I am going to go through these questions, the follow-up
12 questions to the jury.

13 As to the defendants, I was having trouble reading some of
14 those. I understand. I write the same way, but I need to
15 know what it is saying.

16 We were talking about No. 6, in terms of the first item.
17 Do you have a copy?

18 MR. FOX: A copy of the questions I handed up, no,
19 Your Honor.

20 THE COURT: Because some of these would appear that I
21 have asked, but I may go about it another way.

22 Let me put it this way. We have the list you submitted.
23 I will ask the questions I am going to ask off of it, then I
24 will file it with the clerk. So all of your questions will be
25 there in the form that you asked.

1 Now, I think we are ready for the jury to continue?

2 MR. FOX: Are you able to read what I wrote, Your
3 Honor?

4 THE COURT: Well, unless you added something
5 different than what it was I sent the clerk to ask you.

6 MR. FOX: I didn't add anything.

7 THE COURT: If I can't decipher it, I will beg for
8 you, okay.

9 MR. FOX: Okay.

10 THE COURT: Then we are ready?

11 MR. FOX: Then the challenges for cause.

12 THE COURT: I will deal with that. I can deal with
13 that now, if you want to make a record.

14 MR. BARTLETT: I would suggest we listen to all the
15 questions, because there could be a challenge for cause that
16 could come up from his questions.

17 THE COURT: I can't answer that until we put the
18 questions to the jury.

19 MR. FOX: Sure.

20 THE COURT: Let me see if I have anything else I
21 can't read here.

22 One question that I probably won't put to the witness,
23 that was the one about the one that had a commitment of March
24 12.

25 MR. FOX: Your Honor, the only reason for that is in

1 case, for whatever reason it takes longer, plus the
2 deliberations. I have been in trials where jurors have had
3 plane tickets and they just took off in the middle of the
4 trial.

5 THE COURT: I am not going anticipate that problem.
6 Let me say this, the jury is coming back, and I am going to
7 have them seated first. So I am going to ask you to give up
8 your seats for now and see where they end, and then you can
9 come back and take up your position. But I need them to
10 occupy seats right now.

11 You are making your challenges for cause. That will be on
12 the record the same way. What I will do about it will be by
13 is just excusing you.

14 MR. FOX: If you grant one of the prosecutors' for
15 cause, and we disagree with it, is there a procedure for us
16 to --

17 THE COURT: You can make a written record if you
18 disagree with it.

19 MR. FOX: A written record.

20 THE COURT: I don't want you speaking when the jury
21 is here.

22 MR. FOX: I understand that, but sometimes they are
23 done off the record, out of the presence of the jury, but on
24 the record.

25 THE COURT: If you disagree, make it known by

1 writing. If I need to take it up beyond that, I will do that,
2 but I will do it at a time different than in the middle of
3 this. That's all. I want you to make a complete record. I
4 would like for it to be written as much as possible, so you
5 can take it wherever you want to take it.

6 MR. FOX: So there would not be a trial on the
7 challenge for cause at all?

8 THE COURT: No, the Court will rule.

9 MR. BLOOM: Let's say --

10 THE COURT: I don't know any other way to tell you.
11 If it's made, I will either grant it or deny it.

12 MR. BLOOM: If you grant it, then the jury leaves and
13 we are stuck. No matter what record we made -- let's say we
14 want you to ask further questions; we don't have that option.

15 THE COURT: If I excuse them, there will be no
16 further questions.

17 MR. BLOOM: That's what I thought. Mr. Fox was
18 asking, if they made a request to excuse a particular juror
19 and that gives us no opportunity to respond as to why that
20 should not be granted.

21 THE COURT: Mr. Fox, if you want to take it beyond
22 that, I am going to invite you to take it to the Ninth
23 Circuit. I am going to tell you, I am going to grant it or I
24 am going to deny it; or I won't deal with it at all and the
25 record that you made that motion, for cause, it will be on the

1 record. You have submitted a written document to me, who you
2 think should be excused. The government's done the same
3 thing.

4 MR. BLOOM: Right, and we have not had the
5 opportunity to respond to the government's requests.

6 THE COURT: Okay.

7 MR. BLOOM: We object to that, and we would like to
8 have some kind of procedure whereby we can do that.

9 THE COURT: I don't know why you don't understand my
10 answer. My answer is I will grant or deny, end of question.
11 We are going to move on.

12 MR. BLOOM: We think that's wrong.

13 THE COURT: I know what you think. What I am going
14 to ask of you is this, Mr. Bloom: When I make a ruling,
15 accept it, and let's move on. Make your record. Let's move
16 on. I don't want to stand and argue about it all day.

17 MR. BLOOM: That's what I just did.

18 THE COURT: But you won't stop at it there.

19 MR. BLOOM: I just want to protect my client.

20 THE COURT: You are going to get a chance to
21 represent your client. I am going to make sure you get a
22 chance to do that, but you are going to have to let me run
23 this courtroom.

24 All right. Bring them in.

25 (Prospective jury panel present. Voir dire

1 continued.)

2 THE COURT: All right. Now we are down to the
3 parties exercising what they call peremptory challenges. They
4 will be given sheets to do that. They will do what I call
5 look you over, see which one we ought to keep and which ones
6 we ought to let go. That process will take a little while.
7 What I would like for you to do is remain in place so they can
8 look you over and then they will make their strikes. Once
9 they have done that, I will come back on the bench and tell
10 you who will be asked to remain and the ones that will be
11 excused. That's the way we will do that process. So I will
12 disappear from the bench as they do that. You don't have to
13 get up. Just stay right there and let me know when it is
14 time.

15 (Pause.)

16 THE COURT: All right. You may be seated.

17 I am going to read off now the following names. As your
18 name is called, you will be excused from this trial. I will
19 ask you to go back to the clerk's office to see what they have
20 for you from there.

21 (Jury was seated.)

22 THE COURT: All right. Let me ask the government, do
23 you accept this jury as constituted?

24 MR. FRIEDMAN: We do, Your Honor.

25 THE COURT: All right. Defense.

1 MR. BLOOM: Yes, we do. We have something to say,
2 but we accept the jury.

3 MR. FOX: We have something to take up outside the
4 presence of the jury.

5 THE COURT: It doesn't involve them sitting here.

6 MR. FOX: No.

7 THE COURT: I will give you a chance to say a lot of
8 things. I am trying to get this jury so we can get started.

9 MR. FOX: I understand.

10 THE COURT: Then I need you 14 to stand and be sworn.
11 You will be the ones that will try this case and decide this
12 case, so if you would stand and raise your right hand to be
13 sworn.

14 (Jury panel duly sworn.)

15 THE COURT: All right. You may be seated.

16 I am going to give you your first break. Before I do
17 that, the rest of you, it is apparent that we won't need your
18 services for this trial, so you will be excused.

19 I will ask all of you if you would go back to the clerk's
20 office to see what they have for you there, and you will be
21 released from that point. I thank you for coming.

22 You folks will get your first break now.

23 All of your breaks will be taken in the jury room, so you
24 will go in there.

25 The clerk will tell you about your belongings. You can

1 I leave them in there. The door will be locked. The door on
2 the other side, we will make sure that things are locked safe
3 under lock and key. If there are any problems, I expect you
4 to let the staff know so we can address those things.

5 Right now, just take a break. Remember, you haven't heard
6 anything. Just take a break and wait for the next
7 instruction, and I will get back to you shortly.

8 (Jury not present.)

9 THE COURT: You may be seated.

10 One of you, Barb, go in there and see about the jury and
11 the other side door and all that.

12 Now, it's 3:15, the question is where do we go from here?

13 MR. FOX: May I put something on the record, Your
14 Honor?

15 THE COURT: All right.

16 MR. FOX: Your Honor, I guess we accepted these
17 jurors as being qualified, but we did have an objection to the
18 state's use of a peremptory challenge against Ms. Womack, No.
19 28, the only African American in the jury pool. We believe
20 that that was an improper exercise of a peremptory challenge.

21 I noticed this jury pool was mostly white. There was one
22 person with an Hispanic surname. There's one African American
23 woman. And the prosecutor's exercised a peremptory challenge
24 against her. We believe there's no evidence of any type of
25 bias, even against the government, from her answers; and we'd

1 ask the prosecutor provide a race neutral explanation for why
2 they challenged her.

3 MR. BARTLETT: Your Honor, I would point out I
4 believe we do have Mr. Martinez on the jury.

5 THE COURT: I understand.

6 MR. BARTLETT: With regard to Ms. Womack, off the top
7 of my head -- I don't even have my notes in front of me -- I
8 believe she indicated she's 44 years old. She's currently
9 unemployed. It was unclear from her answer exactly what she
10 has been doing. She likes to watch a lot of TV. She's been
11 engaged to the same man, as I understood it, for the last 12
12 years. It appeared that she did not have the types of roots
13 in this community, and unable to make the type -- the kind of
14 decision maker that the United States was looking for.

15 MR. FOX: Your Honor, Ms. Womack grew up in Tacoma.
16 She went to college in upstate New York. She's gone to school
17 a lot. She has worked in the entertainment industry. The
18 fact that she has a relationship for 12 years or so, and
19 hasn't been married to that person, that's not a race neutral
20 explanation. That's something that has nothing to do with
21 someone's ability to serve as a juror.

22 THE COURT: You made your motion. I didn't find
23 anything to say there's anything wrong here, so I am going to
24 leave this jury as constituted; but your motion is there.
25 It's subject to review.

1 MR. FOX: Of course.

2 THE COURT: But I don't see any reason to come to a
3 conclusion or anything sinister about that strike.

4 A couple things, let me ask this question, whether we can
5 get very much done, as far as opening. Maybe we can get one
6 in before the end of the day. I would like to recess this
7 matter, I told you, around 4:30, and that's what I would like
8 to do.

9 I don't know how long of an opening. I know it was
10 mentioned like an hour and a half. I am trying to understand
11 what you can talk about for an hour and a half, but it seems
12 to me that this matter could be wrapped up at least by 4:30.
13 That's an hour and 15 minutes. I don't know what you are
14 going to do with the other 45 minutes you should have left
15 from that. So let me hear from you. I don't like to have
16 them broken up. I like to have them go at the same time.

17 We have a few motions we could probably address, and we
18 could take up some preliminary matters that way and have you
19 both argue your case, your opening in the morning. How does
20 that sound?

21 MR. FRIEDMAN: That's what the government would ask
22 for.

23 MR. BLOOM: As would us.

24 MR. FOX: Would the Court still want us here -- if we
25 can take care of all these preliminary matters now -- do we

1 have to be here at 8:00?

2 THE COURT: I want you here at a time for whatever
3 your problem may be, that I can take care of it before I call
4 the jury in the box. I don't want you to show up five minutes
5 before the time I want the jury there, to bring up a question
6 I can't answer in five minutes, or you can't even say in five
7 minutes.

8 If you have things you want to bring up, you let me know
9 when it is, and I will meet you here. Let's work on that kind
10 of a schedule.

11 The other thing we haven't discussed any further, it's
12 been mentioned by Mr. Bloom, it seems like the 8:30 hour is
13 problematic because Ms. Waters would like to get back to be
14 with the baby. I assume that's what's said.

15 If I don't shorten the hour, like I have indicated, then
16 we are going to go 9:00 to noon, 1:30; lunch is 12:00 to 1:30,
17 and I am going to recess around 4:30. I am not going to cut
18 my time short to deal with it.

19 Now, I have given you the choice. I think you are
20 choosing not to take that choice. Am I correct in that, that
21 will be the procedure?

22 MR. BLOOM: I remember when we originally had this
23 discussion, my recollection is that the prosecution talked
24 about 8:30 to 3:30.

25 MR. BARTLETT: I did; but we will leave it in your

1 hands.

2 MR. BLOOM: How does this sound to the Court: 8:30
3 for preliminary business, 9:00 for the jury to 12:00, and then
4 1:00 to 3:30 for the afternoon session?

5 THE COURT: No, the only thing I am going to change
6 is the way I said. If I don't go with special hours, I want
7 the jury here at 9:00. I want you here with anything that you
8 may bring-- if you have nothing to bring up, I don't care, I
9 don't need to see you, okay; but if you have something to
10 bring up, don't show up at five to 9:00 and want to bring it
11 up.

12 MR. BLOOM: I agree.

13 THE COURT: That's what I am saying. I can even meet
14 you at 8:00, if that's what you want to do on things you want
15 to bring up. I can visit with you over the noon hour. I can
16 stay with you from 4:30 till we get through. I don't have a
17 problem with that. I just don't want you interfering with the
18 jury's time, having them blazing a trail in and out when we
19 can do things in their absence.

20 MR. BLOOM: So, jury 9:00 to 12:00, 1:00 to 3:30,
21 does that work for you?

22 THE COURT: 9:00 to 12:00, 1:30 to 4:30, that will be
23 the schedule.

24 MR. BLOOM: Excuse me, one second, Your Honor.

25 Can we make this suggestion? It has to do with getting

1 back for Ms. Waters to see and be with her child. Could we
2 shorten the lunch hour by a half hour and end at 4:00,
3 instead? Everybody would be happy, including the jury?

4 THE COURT: I don't know if they would be happy or
5 not; I haven't talked to them yet.

6 MR. BARTLETT: I have no objection to that, Your
7 Honor.

8 THE COURT: You are suggesting 9:00 to 12:00, 1:00 to
9 4:00?

10 MR. BLOOM: That's our suggestion.

11 THE COURT: I understand. I am going to get the
12 jury's suggestion, too.

13 Anything else we need to talk about as far as the time?
14 We should let them go, and I will see you here ready to give
15 your opening statement at 9:00.

16 MR. FOX: There are pending motions. Can we deal
17 with those this afternoon?

18 THE COURT: I said we have some motions and things we
19 should take up. We will let the jury go. We will stay here
20 and work, and we will get that done and you will be ready to
21 give your opening at 9:00 in the morning. Is that correct?

22 MR. BLOOM: Yes.

23 THE COURT: We will practice in the mirror tonight so
24 we can shorten the time.

25 MR. BLOOM: I can't even afford a mirror.

1 THE COURT: Have somebody time you. Mr. Fox, he can
2 do that.

3 All right, bring the jury back.

4 (Jury present.)

5 THE COURT: You may be seated.

6 Now, let me ask you this question: This is how I intend
7 to run the case in terms of the time that we will have you
8 here to do your duty, that is, to have you here ready to go,
9 ready to take your positions where you are now, at 9:00 each
10 morning, with a break in the middle of the morning. Recess
11 for lunch from 12:00 to 1:00. Have you back here at 1:00, and
12 go from 1:00, with a break in the afternoon, to 4:00. Then
13 let you go for the day. We will break around 4:00, whatever
14 works as close as possible, and let you go for the day and
15 come back each day; and we will do it this way until this case
16 is over with.

17 Does that fit your schedule pretty good in terms of making
18 it convenient and comfortable for you?

19 (Jurors nodding.)

20 THE COURT: That's the way we intend to do it. You
21 will notice you have 14 there, which means only 12 of you will
22 decide the case; two of you will be eliminated. What's
23 happening here, I am not going to tell you which two, because
24 the names will go in the wheel, and whatever names come out
25 will be the jurors that won't decide the case. I don't want

1 you to expect to be that two that will come out of there. So
2 I want to have all of you give your undivided attention,
3 because you may be going into the jury room. That's the way
4 we will get down to 12 at the end of the case.

5 As you go about your business tonight, as you go home, you
6 may have folks saying "what have you been doing all day;"
7 don't talk to them about the case. Don't think about it.
8 Don't read any news articles. Don't do anything to find out
9 what's going on.

10 Everything you need to decide this case will be given to
11 you here in this courtroom. It's on the government to prove
12 to you, in that fashion, this lady's guilt. I want that to
13 explain to folks why you can't talk to them. Don't let
14 anybody talk to you. Tell them you can't talk.

15 When you are going up and down the hallway, if somebody is
16 trying to talk to you or trying to say something, I want you
17 to report that to the Court.

18 When you are in the courthouse, go directly to the jury
19 room, so I can keep you out of harm's way. I am not trying to
20 make you antisocial, but I don't want anything to influence
21 your decision here or cause you to make a decision but the
22 evidence that you hear here in this courtroom. That's what
23 will be your charge throughout this whole case.

24 All right, I want you to have a good evening. I will see
25 you ready to go right there at 9:00 in the morning.

1 JUROR NO. 1: Can I ask a question? Can we take
2 notes?

3 THE COURT: Let me explain that. I hope you haven't
4 taken any yet because you haven't heard anything. You can
5 take notes, but I want you to rely on your own notes. When
6 you take your notes, each day when we recess for the day, you
7 will leave your notebook on your chair and they will be
8 protected. You will take nothing home or anything like that.
9 If you are going to use that notebook tomorrow, you can leave
10 it in your chair. It will be right there when you get back.

11 JUROR NO. 3: If you start taking notes, and you do
12 go into the deliberation, are you allowed to take your notes?

13 THE COURT: Yes, I am going to give you all these
14 instructions. You are way ahead of me now, but I am going to
15 give you the instructions on the law and how to use your
16 notes. That will come after you've heard all the evidence.
17 You will get all that.

18 Right now, I want you to sit, listen, make your notes and
19 keep them to yourself, and give these folks your undivided
20 attention.

21 Okay. All right, see you in the morning, right there at
22 9:00, hopefully.

23

24

25

1 (Jury departed for the day.)

2 THE COURT: You may be seated.

3 Now, what I would like to do is deal with a few of the
4 motions.

5 Now that the jury has been dismissed, the public is free
6 to view these matters.

7 One question, do you need a break before we start messing
8 with the motions? Is everybody is okay?

9 The first matter I want to take up is -- if I can find
10 it -- has to do with the opening statement and making
11 reference to -- maybe I might have to take a recess. I don't
12 believe I have everything here I thought I had here.

13 I think it had to do with the defense having filed a
14 complaint with the Inspector General against two of the FBI
15 agents. I guess the issue is whether you can file something
16 and then talk about what you filed. That seems to be the
17 issue here as to setting up the straw man and knocking him
18 down I guess. So let me hear exactly why you need to refer to
19 anything like that in your opening statement?

20 MR. FOX: Actually, the government in its response to
21 our letters to them on this issue have suggested that we file
22 a complaint with the Office of Inspector General. So I am not
23 sure why they are so surprised such a complaint was filed.

24 THE COURT: That doesn't answer my question.

25 MR. FOX: We have no intent on bringing out the fact

1 that a particular complaint had been filed. But I do believe
2 that we are entitled to bring up the case agent's biases by
3 cross-examining the agents --

4 THE COURT: Sure, you can bring up the fact that you
5 think they did the best work or sloppy or whatever; but filing
6 the complaint itself --

7 MR. FOX: But their fear of lawsuits and their fear
8 of internal disciplinary procedures being taken against them
9 is certainly fair game for cross-examination under the Sixth
10 Amendment. So we are not going to bring up the fact that:
11 Isn't it true that there is a pending complaint against you?
12 But we do intend to bring up their legitimate fears that what
13 they have done may result in discipline being imposed against
14 them.

15 THE COURT: If you cross-examine them about their
16 work and what they might fear, that's one thing. I am talking
17 about opening statement and making reference to the fact that
18 they have got a complaint filed against him for whatever
19 misconduct. That sounds like it's in the area that the Court
20 has ruled on as far as this trial.

21 MR. FOX: Quite truthfully we haven't thought about
22 that until they filed a motion to --

23 THE COURT: Then that settles that. There's no
24 reference to be made to that in that way.

25 The government has got another motion here asking that the

1 FBI disclose something to do with a parking pass. I don't
2 understand that. Somebody explain to me what that's about.

3 MR. BARTLETT: Your Honor, there was an internal
4 administrative matter with one of our witnesses. The FBI will
5 not release any files relating to this. I assume that the
6 defense may want to examine this.

7 All we are asking is that the Court order the FBI to turn
8 over the file to you so you can take a look at it to see
9 whether or not this issue involving a parking pass is worthy
10 of cross-examination.

11 THE COURT: You mean whether the defense should have
12 the right, kind of a disclosure type --

13 MR. BARTLETT: Exactly, Your Honor, and we don't have
14 it. The FBI won't give it to us, and I haven't seen it.

15 THE COURT: Is that a request, do you want to see it?

16 MR. FOX: Yes, Your Honor.

17 THE COURT: I will order them to let me see it, and I
18 will tell you. I don't know anything about what this is.

19 Some seem to go to, one motion is asking me to order an
20 interview, to grant the defense an interview of the witnesses,
21 the codefendants in this matter. Let me hear the basis that I
22 should do that. Let me ask you this, anybody prohibiting
23 these witnesses from talking to you?

24 MR. FOX: Well, both Jennifer Kolar and Lacey
25 Philabaum and also Susan Savoie, who is a cooperating witness

1 with the government, and also Jennifer Kolar's attorney,
2 Michael Martin, have refused to be interviewed by us prior to
3 this trial. We've basically been stonewalled.

4 Ordinarily, in federal practice, I agree with the case as
5 cited by the government that the Court doesn't have power to
6 order discovery interviews or discovery depositions; but these
7 are very special witnesses. These are witnesses who have pled
8 guilty -- for two of them in this very court -- and agreed to
9 cooperate with the judicial process.

10 They are, in many ways, under the control of the
11 government and actually the control of the Court, because the
12 Court is the supervisor of the plea agreements. And the Court
13 can enforce the plea agreements.

14 So these are very different witnesses, and they don't fit
15 into the category of some ordinary person who has the right to
16 refuse to be interviewed before testifying.

17 This Court has the power, both as a matter of due process
18 so that we have equal access to the people who are cooperating
19 with the government, and as a matter of the Court's Article
20 III powers to enforce the plea agreement to compel Jennifer
21 Kolar, Lacey Philabaum, Susan Savoi e, and Jennifer Kolar's
22 attorney to talk to us so we know exactly what they are going
23 to say about some of the key issues in the case.

24 THE COURT: All right.

25 MR. BARTLETT: Well, Your Honor, it's a little hard

1 to stand in front of this court and say that a cooperating
2 witness, codefendant, is somehow a unique witness that this
3 court never sees. In truth, if you were to take a survey of
4 trials that occur in the Western District of Washington,
5 virtually every trial involves cooperating codefendants
6 testifying against their coconspirators.

7 To claim this is somehow some unique dilemma that this
8 Court is uniquely facing is absurd.

9 Second, the Ninth Circuit case could not be any more
10 clearer. It is beyond this court's powers. These are
11 witnesses. They can choose or not choose to talk to whoever
12 they want. They don't have to talk to me. They don't have to
13 talk to the defense. That is their right.

14 They are under a plea agreement. All of them have been
15 interviewed numerous times. We have turned over those 302s.
16 As was our right, we could have sat on their reports and not
17 turned them over until after they testified.

18 We turned them over months ago. They are totally
19 prepared. There might be some minor questions they have not
20 been able to answer. As the government's motion indicated,
21 there's no general right of discovery in federal criminal
22 matters.

23 They have gotten all of their discovery. We are aware of
24 our obligations under Brady and Giglio. What they are asking
25 this Court to do is to violate what the Ninth Circuit has

1 specifically said is not allowed.

2 THE COURT: Mr. Fox, let me ask you something, as to
3 discovery, other than you'd like the interviews, have you
4 received everything else, the plea agreement and all these
5 things?

6 MR. FOX: We have. For Mr. Martin, despite the
7 Court's invitation at the last hearing that I should tell
8 Mr. Martin that he doesn't need an order to talk to us, he's
9 not talked to us because he believes that his testimony or his
10 discussions with us would be privilege; but these are not
11 witnesses who are just simply witnesses. These are people
12 that are under the control of the government and under the
13 control of the Court. So they don't really have the right
14 just to refuse to cooperate.

15 I would suggest to the government they may want them to be
16 cooperative with us. But if they are not cooperative with us,
17 it impacts Ms. Waters' ability to have a fair trial. And it's
18 not right that the government has unbridled access to these
19 witnesses.

20 Ms. Kolar has been interviewed at least 16 times. She's
21 required to be interviewed as part of her plea agreement. All
22 we ask is that we have the same access.

23 THE COURT: All right. I agree with you that what
24 you are posing is unique. I agree with that. I don't agree
25 with you, because I don't believe that you are entitled to the

1 government -- if you would tell me and convince me that they
2 have blocked these folks talking to you and that these folks
3 are taking it on themselves, that's their choice to talk to
4 you or not. I am not going to order that. I don't think the
5 Court should order that sort of a thing. They are under a
6 plea agreement to testify. You may use that in the
7 cross-examination as you may deal with their credibility and
8 all the rest of it, but I am not going to order them. There's
9 no prohibition here for them to talk to you.

10 MR. FOX: Part of the problem is --

11 THE COURT: I know what the problem is, Mr. Fox.
12 Once you present a situation to me, I am going to rule on it.
13 When I rule on it, I want to try to put an end to it and let
14 you then take it to the next level.

15 MR. FOX: Hopefully, we won't go to the next level.
16 The problem is I can't present that evidence to you because
17 the government hasn't given us full disclosure about the
18 relationship with these witnesses. And the witnesses won't
19 talk to us; so there's no way we can know.

20 THE COURT: If they come here and testify in this
21 case, they have got to talk to you. I am going to let you
22 talk to them in that way. Unless there's another issue, that
23 one is at rest.

24 MR. BLOOM: You seem to be focused on the three
25 witnesses, and I am not asking you to reconsider that. I am

1 asking you to consider our motion with regard to the attorney.

2 MR. BARTLETT: Objection, Your Honor --

3 THE COURT: It's the same thing.

4 MR. BARTLETT: -- Mr. Fox was making the argument
5 here. They don't both get to get up and argue to everything
6 before the Court.

7 THE COURT: Mr. Bartlett, let me handle this.
8 Mr. Bloom, I don't want to go over these things over and over
9 again. Mr. Fox will get up and make the argument, then you
10 come with something just a little bit different. One of you
11 take the lead here. I don't know who is the lead here. Mr. Fox
12 seems to be doing the most of it.

13 So Mr. Martin falls in the same category as any other
14 witness. As long as they are not blocking that person from
15 being interviewed by you, that's as far as this Court is going
16 to take it. I can't be any clearer than that.

17 I can't make them talk to you, and I am not going to order
18 it because I find no legal basis to do that under this
19 circumstance. I see these cases all the time, and I see
20 witness's signed plea agreements, and come in here and turn
21 statements evidence all the time; so that's nothing new and
22 unique in that fashion.

23 All right.

24 MR. BLOOM: First, I just want to object to
25 Mr. Bartlett interrupting me. I hadn't interrupted him, and I

1 don't like him interrupting or doing it in a loud voice. And
2 I would ask the Court to tell him not to do that any more.

3 THE COURT: Mr. Bloom, we can prolong these things
4 because we can argue about things that don't make a difference
5 what this case is about. I have told you about that burden
6 and all that. At some point in time, it's got to get to the
7 evidence.

8 MR. BLOOM: Of course.

9 THE COURT: Okay.

10 MR. BLOOM: I know you've made the ruling.

11 THE COURT: But you never accept it. I don't believe
12 you accepted very many rulings I have made here in this whole
13 case. I understand you disagree with my rulings. What I am
14 saying, accept them and move on.

15 MR. BLOOM: I am. I just want to make the record. I
16 am not asking you to reconsider. The record as to Mr. Martin,
17 I have not gotten a piece of paper with regard to
18 Mr. Martin --

19 THE COURT: Should I stop and wait until you get
20 through?

21 MR. BLOOM: I have a record to make, and I am
22 asking -- I am not asking you to reconsider. You've made your
23 ruling.

24 THE COURT: Mr. Fox just argued the motion that you
25 are talking about now.

1 MR. BLOOM: What he didn't get to say -- and I can
2 ask him to say it.

3 THE COURT: Go over there and ask him to say it.

4 MR. BLOOM: Okay.

5 MR. FOX: Your Honor, Mr. Martin has not provided us,
6 nor has the government provided us, with any record with some
7 of the key issues in this case. So we haven't gotten the
8 discovery of Mr. Martin. Mr. Martin takes the position that
9 everything is privileged.

10 THE COURT: Did I not answer that? Did I not answer
11 that in a written order?

12 MR. FOX: No. You orally said Mr. Bartlett did not
13 need an order to talk to us.

14 THE COURT: Let me say it again. He does not need a
15 court order to talk to you. It's up to him to talk to you.
16 As long as the government is not preventing him from talking
17 to you, end of question.

18 Do you think that's settled now at this point? As I
19 mentioned about the witnesses, remember how I mentioned how we
20 are going to handle the witnesses? Is that clear to everybody
21 now? Before the witness is called to testify, you will get
22 the gist of the testimony from that witness. If there's any
23 exhibits to be used with that witness, you will get that. If
24 any discussion needs to be taken up about that, and the
25 propriety of that, we will do that before that witness is

1 allowed to testify.

2 Remember all that? That will be the procedure that I will
3 use on all of these witnesses, and I think it is clear.

4 All right, let's see if we can move on now to the next
5 question.

6 MR. BLOOM: With regard to that, the prosecution has
7 informed us that after opening statements -- and I believe I
8 am correct -- that the first witness they intend to call is a
9 law enforcement ATF witness Comery. I think we will get to
10 him, and I think we will get to other witnesses after that.
11 Could I request after Comery, what do they have in mind?

12 THE COURT: I don't know how else to say this. This
13 is what I expect them to do. When I hear from you that they
14 didn't do that, I will take it up.

15 MR. BLOOM: I am not complaining, because at most we
16 are going to get to him today, but now that the timing is
17 changed, there's going to be more than Comery tomorrow. And I
18 would like to know that tonight so we can be prepared.

19 THE COURT: Sometimes I don't believe you were at
20 that pretrial conference that I had.

21 All right, let's move on to the next.

22 MR. BLOOM: I was. Although the public was excluded,
23 I was here.

24 THE COURT: You keep mentioning that.

25 The Defendant's discovery demands has to do with Robert

1 Corrina and Kara Larson. They are saying that they perjured
2 themselves. I don't know who's going to take that up, Mr. Fox
3 or Mr. Bloom; one of you take it up.

4 MR. FOX: Your Honor, the government has answered.
5 We asked for any agreements they made with Mr. Corrina and
6 Ms. Larson who, according to the government's own story,
7 perjured themselves. And the government answered and said
8 there are no agreements.

9 THE COURT: Is that answer good enough, unless you
10 see something to the contrary?

11 MR. FOX: We will find out.

12 THE COURT: They said they have turned over
13 everything they should turn over to you as it involves those
14 witnesses. So that would seem to be a moot issue at this
15 point, anyway.

16 I think there was another issue, what I mentioned about
17 the complaint filed against the FBI and the Inspector General,
18 involving those same two FBI officers. That was their notes
19 being somehow -- or the possibility of saying to the jury that
20 they will actually see those notes. I think it comes up in
21 the area where there's a reason to say something, impeachment
22 in some way that would cause that to be an issue, something
23 different than what those notes reflect and that sort of
24 thing.

25 So any more to be heard on that?

1 MR. FOX: Yes, Your Honor.

2 First off, I guess I am not sure exactly what the
3 government's motion is. The 302 reports, in many instances,
4 have been adopted by witnesses. I refer the Court to what's
5 been marked for identification as Defense Exhibit A-49, which
6 are the notes of Anthony Torres, Special Agent for the FBI,
7 where he records on February 24, 2006, Ms. Kolar apparently
8 reviewed the version of the 302 from the December 16 proffer
9 session and pointed out changes that were to be made.

10 So given the fact that Ms. Kolar reviewed the 302 and made
11 changes, it is our position that she adopted that; and that
12 that particular 302 is her statement essentially.

13 THE COURT: Adopted in what way, she signed
14 something?

15 MR. FOX: She reviewed it and made changes. If you
16 review a document and suggest changes, and you don't change
17 other things, it kind of becomes your statement to that point.
18 It's an oral statement, oral adoption of the statement.

19 Secondly, certainly a witness can have his or her memory
20 refreshed by an agent's 302 report.

21 THE COURT: That's not the question I am asking. The
22 question is whether or not in opening statement you will be
23 saying to this jury that they will actually have these
24 documents in their hand. That's what I am talking about.

25 MR. FOX: Well, to the extent, first off, yes, we

1 plan on introducing that. We know that --

2 THE COURT: What I am going to suggest is this: I
3 wouldn't tell them that you are going to be able to produce
4 something without knowing the answer. I am saying, I would
5 advise you not to deal with that in your opening statement.
6 Deal with that in the usual fashion and try to get it in as an
7 exhibit or what have you, and I will take it up at that time.

8 MR. FOX: May I consult with counsel for a second?

9 THE COURT: You may.

10 (Discussion off the record.)

11 MR. FOX: Well, Your Honor, we believe that in
12 particular some of the case agent's handwritten notes are
13 substantive evidence. Substantive evidence of, as a U.S.
14 Supreme Court described it, slovenly police investigation.
15 They also would constitute present sense impressions and
16 recorded recollections, which are exceptions to hearsay.

17 So, in particular, Special Agent Torres's handwritten
18 notes documenting the five people that Jennifer Kolar
19 identified --

20 THE COURT: I understand what you are saying,
21 Mr. Fox. What I am saying is this: I am not subscribing to
22 what you are saying now in terms of opening statement. I may
23 disagree with you as to whether they should be admitted as an
24 exhibit so the jury can see it. Because depending on how it's
25 being utilized. I am not going to let you say the wrong

1 thing; or if you say the wrong thing, I am not going to let
2 you put error in the record and expect the benefit from it.

3 MR. FOX: So you are not ruling on it now?

4 THE COURT: I am saying I would stay away from it in
5 opening statement because of the problem it may bring up, but
6 I will decide that at the time. Remember how I said we were
7 going to handle the witnesses again. They will give you the
8 gist of their testimony, the exhibits they are going to use
9 and that sort of thing. We will get together, discuss it, and
10 I will tell you what I am going to do about that at that time.

11 Before any witness is called to testify, we will settle
12 those issues you are raising now at that point in time.

13 MR. FOX: Okay.

14 THE COURT: You won't be precluded from bringing
15 this. I am saying if you tell this jury something to expect,
16 that you can't produce, I am not going to let you benefit from
17 that by saying, well, mistrial or some other thing or motion
18 you may bring. Okay.

19 MR. FOX: Okay, thank you.

20 THE COURT: That's all I am saying.

21 Now, did we get through with the Corrina\Larson matter?

22 MR. BARTLETT: Yes, Your Honor.

23 THE COURT: Then the next one has to do with a person
24 by the name of Tiffany Tudder may testify, something to the
25 fact that she heard -- what she heard Ms. Waters say at one of

1 the gatherings, something to the effect that she believed in
2 all of what was taking place except bringing about injuries, I
3 believe, something along that line.

4 MR. FOX: Your Honor, based upon our investigation,
5 Ms. Tudder does not have an independent recollection of very
6 much. Therefore, we are simply asking for an offer of proof
7 before she testifies, so that the jury --

8 THE COURT: Offer of proof as to what?

9 MR. FOX: As to what her testimony would be.

10 THE COURT: Well, that's what I say how I will handle
11 the witnesses. I keep saying that.

12 MR. FOX: I filed the motion. I guess we could
13 reserve that issue until she testifies, to the day of her
14 testimony. We would ask that the government not bring that up
15 in opening statement because we think that the government
16 would then be tainting the jury by bringing up information
17 that's inadmissible.

18 THE COURT: You are well taken. My Bartlett, are you
19 going to bring this up in terms of opening?

20 MR. BARTLETT: Just a moment, Your Honor.

21 (Discussion held off the record.)

22 MR. BARTLETT: Based on our discussions with
23 Ms. Tudder, I am certain that it will be admissible. She's
24 not going to be here until this weekend, and we will remove it
25 from our opening.

1 THE COURT: I think that settles that, I will handle
2 that the same way as I do any other witnesses in the matter.
3 All I can say to you, be careful bringing up things in opening
4 that you can't follow through on, as to what that may mean for
5 either side.

6 The next matter has to do with another exhibit. I don't
7 know if we need to take it up today. This is one that keeps
8 floating around, Exhibit 612 that deals with a pamphlet, I
9 believe, that Ms. Kolar turned over to the FBI that's got
10 Ms. Waters' name on it, Kolar's name, Philabaum's name.

11 MR. FOX: I think we can deal with it the same way.
12 I would ask it not be raised in opening.

13 MR. BARTLETT: We are not going to raise it in
14 opening.

15 THE COURT: We can settle that in the same fashion.

16 I believe these were all filed this morning, over the
17 weekend or something. These are the new ones I hadn't seen.
18 I think I have seen the others. We have been over them from
19 motions, to motions for reconsideration, to status conference
20 about them. I have turned them every way but loose, so I
21 don't know what else to say about them, other than the Court
22 has ruled on these motions in limine. The rulings are there.
23 Most of them I did with a written order, so memories wouldn't
24 lapse too much on me and all those kind of things.

25 MR. FOX: I had two questions about the Court's

1 orders. The first is I actually don't believe we received a
2 written order on the motion for reconsideration on the
3 destructive device issue. I don't recall seeing that.

4 THE COURT: I will have to look. I have got a stack
5 of papers like this. I will look in there to see if it's
6 there.

7 MR. FOX: I think orally you said that, but I never
8 saw a written order.

9 THE COURT: I will see if it's written. If not, we
10 can talk to this young lady over here and she can pull it up;
11 but I am sure I ruled on it.

12 MR. FOX: The second thing, and maybe I missed this
13 myself, I thought the minute entry was the Court was going to
14 issue a written order on the motions in limine from the
15 pretrial conference.

16 THE COURT: I think what I told you was this: As we
17 went through the pretrial conference, we were writing the
18 order at that time. If anybody wanted to know what I said,
19 you can order it out from her, and everything verbatim would
20 be there. I think that's what my answer would be. That's my
21 standard answer.

22 MR. FOX: I thought I saw something come across, a
23 minute entry saying there was going to be a --

24 THE COURT: I don't recall that. Do you need to
25 order that?

1 MR. FOX: I think maybe counsel and we can talk at
2 some point just to make sure we are on the same page, make
3 sure we all agree as to what you said.

4 THE COURT: Well, if you don't agree with what I
5 said, I can tell you again what I said, I think.

6 MR. FOX: I am not asking you to do that.

7 The other thing we raised at the pretrial conference was
8 the issue of coconspirator hearsay. We went round and round
9 about this, and the Court had asked me to write up, to send to
10 the prosecution the items from discovery which I thought they
11 were going to be offering under the coconspirator hearsay
12 exception. I did that. I have to be frank, I am not totally
13 clear from where we go from here with regards to that issue.

14 I sent them something. They sent me a letter back saying
15 they weren't sure that's exactly what you had ordered. Maybe
16 the government can clarify where we are on that issue.

17 THE COURT: If they know, then I would think that
18 would shorten time.

19 At some point I want to get it to the point where we can
20 present this to these folks who will make a difference here.
21 We can go around and around and nitpick forever, but it is
22 going to get to the point where we have to get it to them.

23 If you know those questions, at the same time I mentioned
24 how we are going to handle the witness, those statements will
25 be coming in through witnesses; same answer.

1 MR. FOX: Shall we deal with it the day of their
2 testimony?

3 THE COURT: We will deal with it the day they are
4 going to testify, what they are going to talk about and what
5 exhibits to support that. When I see that, I can say that's
6 not a coconspirator statement, that's something else; and I
7 will have to rule on it.

8 If they have it and can provide it, get it to them. I
9 think the Court will be able to deal with any issues as they
10 come up.

11 MR. FOX: That's a loose end, Your Honor; I am just
12 trying to tie it up.

13 THE COURT: I can't close every end right now. The
14 trial doesn't work like that. I know you'd love to have it
15 like that. If everything was so certain and without any doubt
16 here going on, then maybe we wouldn't have this kind of thing.
17 We could plug it in a computer and do some other things and
18 come up with another procedure. We can't do that.

19 Any others?

20 MR. BARTLETT: One final issue. I was struck during
21 the initial voir dire this morning about how many members of
22 the jury pool had actually heard or read articles about this
23 case. So I think it would be prudent for the Court to ask
24 both sides not to talk to the press until after a verdict is
25 reached in this case. All the matters that the public needs

1 to know will come out in open court. I don't think there's
2 any need for either party to talk to the press outside of the
3 courtroom.

4 THE COURT: I don't see the need for that. I always
5 advise folks not to do that. I assume the press, if they are
6 writing about this, they have some interest in it and maybe
7 they would come here and see what's going on and decide for
8 themselves and write about that and not get everybody's spin
9 on what's taking place here. That's all I can ask of you.

10 If it gets to the point where the Court needs to take some
11 other action, I guess we will see.

12 Right now, I don't see any need to do that, but I would
13 expect you to conduct yourself like that. You are lawyers.
14 You are officers of the Court. I expect you to conduct
15 yourself that way. That's all I can ever say to lawyers.
16 They don't always listen to me, but that's what I say.

17 MR. BLOOM: I have one very small matter I am going
18 to ask the Court to deal with.

19 If the Court has not yet acted on the most recent CJA
20 voucher, I would ask the Court to do so. I am having some
21 real bill paying problems.

22 THE COURT: I deal with them the way I always deal
23 with them, in due course. Certain things I ask of the folks
24 that tell me about whatever is listed on the vouchers, and
25 then I act on them. That's how I do it.

1 MR. BLOOM: There was a letter from the standing
2 committee about 10 days ago. I just ask the Court to look
3 into it, please.

4 THE COURT: And you know I always deal with the
5 standing committee.

6 MR. BLOOM: Sure. I just wanted the Court to be
7 aware of the situation.

8 THE COURT: I am. Nothing will be held up that
9 shouldn't be approved. I guarantee you that.
10 Anything else?

11 MR. BARTLETT: Nothing, Your Honor.

12 THE COURT: Then I will see you folks back here.

13 I think we have decided -- well, I don't think there's
14 anything that should be taken up before the jury is in the box
15 at 9:00. If so, 8:30 will be the time that I will meet you
16 here. I will be here. Knock on the door. Get security.
17 Find somebody. But I want the jury in the box at 9:00 and
18 ready to go.

19 I will ask you to think about again what I said about
20 openings. I still say that at some point in time everybody
21 has got to stop talking so those folks can do their job.
22 Sometimes we don't want to stop talking because we don't want
23 folks to vote, but it's got to get to that.

24 So things that we need to argue about, let's argue about
25 them. But you might want to look at this case in terms of

1 things where now there's no real dispute. As I understand
2 what Ms. Waters is saying, she was not involved in any of
3 this, and all of that. So it's what she's got to say about
4 that, as well as the credibility of these other folks. What
5 happened over there at the University of Washington, whether
6 the building caught on fire and all that, doesn't seem to be
7 an issue. It seems to be in that realm. Then that ought to
8 be the focus. And what I am asking you to do is look at what
9 you are presenting and focus on the issues that this jury has
10 got to decide.

11 MR. BLOOM: Sure.

12 THE COURT: Anything else?

13 MR. BARTLETT: Nothing Your Honor.

14 THE COURT: All right. See you in the morning.

15 THE CLERK: All rise, Court is in recess.

16 (The Court recessed to Tuesday, February 12, 2008, at
17 the hour of 9:00 a.m.)

18 * * * * *

19 C E R T I F I C A T E

20

21 I certify that the foregoing is a correct transcript from
22 the record of proceedings in the above-entitled matter.

23

24 /S/ Teri Hendrix

May 2, 2008

25 Teri Hendrix, Court Reporter

Date